

**IN THE SUPREME COURT OF FIJI**

**Civil Petition No. CBV0020/2018**

**[on appeal from Court of Appeal  
Civil Appeal No. ABU 27 of 2017]**

**BETWEEN: FIJI REVENUE AND CUSTOMS SERVICES**

**Petitioner**

**AND: NEW INDIA ASSURANCE COMPANY LIMITED**

**Respondent**

**Coram: Kumar J**

**Counsel: Mr O. Verebalavu and Mr E. Qalo for Petitioner/Applicant  
Mr B. Solanki for Respondent**

**Date of Hearing: 30 April 2019**

**Date of Ruling: 15 November 2019**

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**R U L I N G**

**(Application for Enlargement of Time)**

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**Introduction**

[1] On 11 March 2019, Petitioner (“**Applicant**”) filed Notice of Motion seeking following Orders:-

- “1. That Leave be granted to the Petitioner to serve out of time its Petition for Leave to Appeal filed on 16<sup>th</sup> November 2018 to the Respondent.
2. That 21 days be granted to the Petitioner to serve its Petition for Leave to Appeal to the Respondent.
3. That cost of this application to be costs in the cause.
4. Any other orders that the court may deem just and equitable in the circumstances.”

*(“the Application”)*

[2] The Application was called on 19 March 2019, when parties were directed to file Affidavits and the Application was adjourned to 30 April 2019, for hearing.

[3] Both parties filed Submissions and made Oral Submissions.

### **Chronology of Events**

[4] On 5 October 2018, Court of Appeal delivered Judgment in favour of the Respondent in Civil Appeal No. ABU 25 of 2017.

[5] On Friday 16 November 2018 (last day for filing and serving Petition) at 3.50pm, the Applicant filed the Petition.

[6] The Petition was served on the Respondent on Tuesday, 20 November 2018.

[7] The Petition was called on 25 February 2019, when Applicant was granted fourteen (14) days to file and serve Application for Extension of Time within fourteen days and this matter was adjourned to 19 March 2019.

[8] Following Affidavits were filed on behalf of the parties:-

**For Applicant:**

Affidavit of Vasemaca Joshuaia sworn and filed on 11 March 2019 (“**Applicant’s Affidavit**”)

**For Respondent:**

Affidavit of Arjun Singh Karwal sworn on 1<sup>st</sup> April 2019 and filed on 2 April 2019 (“**Respondent’s Affidavit**”).

**Application for Enlargement of Time**

[9] The Petition was called before this Honourable Court on the 25<sup>th</sup> of February 2019, when it was determined that the Petition was served late on the Respondent thus contravening Rule 5(b) of the Supreme Court Rules 2016 and the Court granted leave for Applicant to file Application for Enlargement of Time within fourteen (14) days.

[10] It was well established this Court has unfettered discretion to grant or refuse Leave to Appeal out of Time. The factors which of course are not exhaustive that needs to be taken into consideration when dealing with such applications are:-

- (i) Length of delay;
- (ii) Reason for the delay;
- (iii) Chance of appeal succeeding if time for appeal is extended or merits of the case;  
and
- (iv) Degree of Prejudice to the Respondent if application is granted.

**CM Van Stilleveldto B V v. E L Carriene Inc.** [1983] 1 ALL ER 699 of 704; **Norwich and Peterborough Building Society v. Steed** [1992] 2 ALL ER 830 at 83; **Ist Deo Maharaj v. BP (South Sea) Co. Ltd.** Civil Appeal No. ABU0051 of 1994S – FCA as page J.

[11] Hence the Court must be given facts, in the form of evidence explaining and/or covering these four factors.

**Latchmi & Anor v. Moti & Ors** (1964) 10 FLR 138.

[12] It must be understood that when Court is empowered to exercise a discretion, it should do so judicially and in the interest of justice.

[13] The factors provided by Courts when dealing with certain Applications are to guide Court to reach a decision which is fair and just under the circumstances of each case and to ensure the decisions are consistent on such Applications based on similar set of facts.

[14] In exercising the discretion, the Court should consider the factors highlighted by superior Courts in addition to any other factors they think necessary before reaching a decision which they consider will serve interest of justice in a particular case.

[15] Interest of Justice demands that the Courts take a holistic approach by considering all the factors mentioned at paragraph [0] in addition to any other relevant factors before reaching a decision rather than dismissing the application after considering only one or two factors.

**Length of Delay**

[16] When considering length of delay, the Court looks at the period between the last day of doing an act which in this instance is service of Petition and the time for filing of Application for Enlargement of Time as is rightly pointed out by Counsel for the Respondent.

[16] This Court, therefore rejects Applicant’s Submission that delay is only three (3) days being period between the Petition was filed (16 November 2018) and the Petition was served (20 November 2018).

[17] For failure to comply with the rules, the length of delay in this instance is 116 days which is calculated as follows:-

Last date for Service of Petition	16 November 2018
Date Application for Enlargement filed	<u>11 March 2019</u>
<b>Number of days</b>	<b><u>116 days</u></b>

[18] However, on 25 February 2019, this Court granted time for Applicant to file and serve Application for Enlargement of time within fourteen (14) days which the Applicant did.

[19] Since, this Court granted Applicant Leave to file Application for Enlargement of Time after expiry of 102 days, this factor is not relevant.

### **Reason for Delay**

[20] Lord Davies in **Revici’s** case stated that:-

*“... rules are there to be observed and if there is non-compliance (other than a minimal kind), that is something which has to be explained away. Prima Facie if no excuse is offered, no indulgence should be granted” (at 747 para F).*

Application was refused in **Revici’s** case as no explanation for delay was given.

[21] In **1st Deo Maharaj** – the Court of Appeal adopted with approval the following quote from **Gallo v. Dawson** [1990] 64 ALJR 458 at 459.

*“Case needs to be exceptional before a Court would enlarge by many months*

*the time for lodging an appeal simply because the applicant had refrained from appealing until he/she had researched the issues involved. In Hughes v. National Trustees Executors & Agency Co. of Australasia Ltd [1978] VR 257, McInerney J pointed out (at 263) that one object of fixing times under court rules is “to achieve a timetable for the conduct of litigation in order to achieve finality of judicial determinations.” When the time for appealing has expired, the litigation is at an end; the successful party is entitled to the benefit of the judgment in his or her favour. At that stage, the successful party has a “vested right to retain the judgment”. It would make a mockery of O 70, r 3 if, months after the time for appealing has expired, the unsuccessful party could obtain an extension of time on the ground that he or she had delayed appealing because that person wanted to research the issues involved. Lack of knowledge is a misfortune, not a privilege.”*

[22] In **Tevita Fa v Tradewinds Marine Ltd. & Anor.** – Civil Appeal No. ABU0040 of 1994 (FCA) – His Lordship Justice Thomson (as then he was) in dismissing Appellant’s application for extension to appeal made four days after the expiration of time to appeal stated:-

*“The application for leave to appeal was fixed only 4 days after the end of the period of six weeks. That is a very short period but time-limits are set with the intention that they should be observed and even lateness of only a four days requires a satisfactory explanation before an extension of time can properly be granted. In this case, as stated above, the applicant has given no explanation at all. That he may have been confused is merely an inference that Mr. Patel has asked me to draw from his statement of present belief that time began to run only from 8 August, 1994.”*

In **Tevita Fa’s** case, it was submitted by Appellants’ Counsel that there had been a misunderstanding on the solicitor’s part as to when time started running for Appeal.

[23] The following explanation for delay has been held to be unsatisfactory and not a basis for granting extension by the Fiji Court of Appeal:-

- Oversight by instructing solicitor due to Appellant's commitment in Australia even when the Appellant's solicitor was engaged in a Supreme Court (now High Court) criminal trial at relevant time for filing appeal. **Jawant Singh v. Peter Francis** (Action No. 57 of 1973 FCA (cyclostyled judgment) – Marsack JA (referred to in 1st Deo's case at page 3).
- Misunderstanding as to when time for appeal started running.  
[**Tevita Fa's case**]
- Misunderstanding of the effect of Court of Appeal judgment concerning Special Damages.  
**Attorney General of Fiji & Anor v. Paul Praveen Sharma** – Civil Appeal No. ABU0041/93S – FCA.
- Applicant's solicitor mistakenly thought they had 30 days in which to appeal from the date on which judgment was served (Applicant's solicitors to be blamed – not applicant).  
[**Latchmi's case**]
- Miscalculation of Time: **McCaig v. Manu** [2012] FJSC; CBV 2 of 2013 (27 August 2012).
- Unable to pay legal fees: **Datt v. Datt** [2013] FJCA; Misc Action 53 of 2011 (7 June 2013).

[24] Even though this Court on 25 February 2019, granted Leave for Applicant to file Application for Enlargement of Time, the Applicant needs to explain the reason for delay of 116 days in making the Application for Enlargement of Time.

[25] At paragraphs 11 to 24, Vasemaca Joshuaia, who swore Applicant's Affidavit states as follows:-

*“11. That I was instructed by the then Legal Officer in carriage of this Petition at around 8 am in the morning on Friday the 16<sup>th</sup> of November, to arrange a meeting for him with the other Legal officers in the department.*

12. *That in the meeting, the Legal Officer in carriage of the Petition had instructed the other Officers to assist in the drafting and compilation of the Supreme Court Appeal documents for this Petition.*
13. *That during the meeting, the Legal Officers were notified the Petition for Leave to Appeal to the Supreme Court was to be compiled and filed on the same day as it was final day for filing an Appeal to this Honourable Court against the Court of Appeal judgment as stated in paragraph 4.*
14. *That with the Assistance of the other Legal Officers, the Supreme Court Appeal documents for this Petition was finalized at around 3.00 and I was instructed to deliver the same to the High Court Civil Registry in Suva for filing.*
15. *That I had waited at the high Court Civil Registry in Suva until 3.30pm to which upon being served by the Registry, I was informed that I had to file the Petition at the Supreme Court Registry.*
16. *That I had sought directions from the High Court Civil Registry as to the whereabouts of the Supreme Court Registry to which the same was given before I was able to locate the same and file the Petition.*
17. *That the Petition was filed at around 3.50pm on the 16<sup>th</sup> of November, 2018. I was also informed by the Supreme Court Registry that I had to make payments for the filing fees at the High Court Civil Registry.*
18. *That the Legal Officer in carriage of the Petition who had accompanied me had volunteered to go down to the High Court Civil Registry to facilitate for the payment of the filing fees before collecting the Petition from the Supreme Court Registry.*
19. *That there was a public Holiday on Monday the 19<sup>th</sup> of November, 2018 which was Prophet Mohammed's Day.*
20. *That on the 20<sup>th</sup> of November 2018, I had enquired with the Legal Officer in carriage of the Petition whether he had collected the Petition from the Supreme Court Registry after making payments at the High Court Registry.*
21. *That he had stated that the filing fees had been paid, but the Petition could not be collected as the Supreme Court Registry was closed when he had returned to pick up the Petition."*

[26] The reason given by the Applicant is in respect to service of the Petition on 20 November 2018 instead of 16 November 2018, is taken as genuine as 19 November 2018, was declared Public Holiday.

[27] No reason has been provided for failure to file Application for Enlargement of Time for service of the Petition after becoming aware of it on or about 23 November 2018, when



Solicitors for the Respondent wrote to the Court and copied the letter to the Respondent's Team Leader highlighting the defect.

- [28] At paragraph 24 of Applicant's Affidavit is stated that as of 1<sup>st</sup> January 2019, this matter had been allocated to a new Legal Officer.
- [29] This Court notes that no reason has been provided by the Applicant as to why no Application for Enlargement of Time was filed from 1<sup>st</sup> January 2019 upto 25 February 2019, atleast.
- [30] No evidence has been provided to Court as to when the Legal Officer who had carriage of the matter before it handing over this matter to "new Legal Officer" before leaving the Applicant.
- [31] This Court, therefore, finds that Applicant has failed and/or neglected to provide any reason at all for its delay in filing the Application for Enlargement of Time.

### **Merits of the Appeal**

- [32] His Lordship Justice Richmond in **Avery v. No. 2 Public Service Appeal Board & Ors** [1973] 2 NZLR 86 stated as follows:

*"Once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal."*

- [33] Petition for Leave to Supreme Court is governed by Section 7 of Supreme Court Act which provides as follows:-

- “7(1) In exercising its jurisdiction under section 98 of the Constitution of the Republic of Fiji with respect to leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case:-
- (a) refuse to grant leave to appeal;
  - (b) grant leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
  - (c) grant leave and allow the appeal and make such other orders as the circumstances of the case require.
- (2) ....
- (3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant leave to appeal unless the case raises:-
- (a) a far-reaching question of law;
  - (b) a matter of great general or public importance;
  - (c) a matter that is otherwise of substantial general interest to the administration of civil justice.”

[34] This matter deals with section 7C of Income Tax Act 1974 (**ITA**). Section 7C provides as follows:-

**“7(C) Branch Profit Remittance - Additional Normal Tax**

1. *Notwithstanding any other taxes imposed under this Act, there shall be paid a tax known as branch profit remittance additional normal tax equal to fifteen percent (15%) of any branch profits derived in Fiji by a non-resident;*
2. *The non-resident company carrying on business in Fiji shall be liable for the tax and the tax shall be recovered from the company paying or crediting branch profits to non-resident;*
3. *The company which, in accordance with the provision of subsection (2), is required to pay the tax shall remit the same to the Commissioner of Inland Revenue within 30 days, or such period as the Commissioner of Inland Revenue may specify, of the payments or crediting of the branch profits;*
4. *For the purpose of this section, the branch profit remittance tax shall be levied on the branch profits paid or credited by the company to the extent*

*that it has not been paid or credited from income which has been charged to tax;*

5. *Tax shall be based on the profits paid or credited for remittance. Profits refer to the after tax earnings to the extent that the head office does not reinvest such amount to the Fiji Branch.”*

[35] Brief fact obtained from Court of Appeal decision is as follows:-

- (i) Applicant (FRCS) imposed tax on profits invested by the Respondent in term deposit with financial institutions;
- (ii) Respondent’s objection was disallowed by the Applicant on the grounds that, BPRANT is payable when parent company (non-resident) is entitled to request the money to be sent to them, BPRANT is not payable when funds are re-invested in the branch and placing funds in fixed deposit does not qualify for capital investment under s21(2) of Income Tax Act;
- (iii) Respondent’s Application for Review was dismissed by Tax Tribunal;
- (iv) Respondent’s appeal to High Court was dismissed as well.

[36] Court of Appeal allowed Respondent’s Appeal and the gist of Court of Appeal reasoning is that there is no evidence of remittance or payment of monies that is subject to tax assessment by the Applicant that is caught under section 7C of ITA.

[37] The Applicant at paragraph 3(i) to (ii) of its Submission submits as follows:-

“3(i) It is humbly submitted that there are valid grounds to appeal the decision of the Court of Appeal and that the learned Justices of the Court of Appeal wrongly interpreted section 7C(5) of the Income Tax Act (ITA) Cap. 201. That the tax tribunal and the tax court was correct in its interpretation of section 7C(5) of the ITA Cap. 201 as the following:-

- (a) That it is not necessary for there to be a remittance to impose the tax. As long as there is a branch profit additional tax of 15% is applicable;

- (b) It attempted to define when the profits could be evaluated;
  - (c) If they were to be reinvested in the Branch, then they could remain exempt from taxation;
  - (d) The fact that the profits remain shown as retained earnings is of little importance in the case where the head office and the branch office are one and the same;
  - (e) The payment would be made as soon as those funds are available for use. This is when they are available for remittance.
- (ii) It is humbly submitted that the Petitioner be granted enlargement of time appeal the decision of the Court of Appeal as there had been two lower courts who have given the same interpretation of section 7C(5) of the ITA Cap. 201 and it was both in favour of the Petitioner.”

[38] Respondent has made very comprehensive Submission in support of Court of Appeal decision and its reasons.

[39] At paragraph 13 of Court of Appeal decision it is stated as follows:-

“[13] There is no doubt that BPRANT is an additional tax. The section itself states so. This tax is imposed in addition to the normal tax. That is why it is called additional tax. This applies to non-resident companies where the Head Office is located overseas, the branch located in Fiji. When a branch makes a profit, it may do various things with those profits. It may reinvest in the branch, invest elsewhere or remit the profits to the parent company overseas. Profits could be either paid or credited for remittance. The law (section 7C and 7CA) covers branch profit remittances, and captures both monies remitted as well as monies credited for remittance.”

[40] Whether the issue raised on appeal meets the requirement in section 7 of SCA is matter for determination by the Full Court of Supreme Court.

[41] Interpretation of s7C of ITA was also subject to Court of Appeal decision **Scipio Investments Limited v Fiji Revenue and Customs Authority** Civil Appeal No. ABU 55/2017. Without making any final determination on how s7C of ITA is to be interpreted it appears that Applicant is like to obtain Leave to Appeal the Court of Appeal decision to Supreme Court.

[42] On the face of what has been submitted by the parties this Court is of the view that whether Leave to Appeal should be granted to the Applicant should be determined by the Full Court.

### **Prejudice to Respondent**

[43] In **Avery's** case his Lordship Justice Richmond at page 92 further stated:-

*“The rules do not provide that the Court may grant leave if satisfied that no material prejudice has been caused by the failure to appeal in time. Everything is left to the discretion of the Court on the wide basis that leave may be granted in such cases as the justice of the case may require. In order to determine the justice of any particular case the Court should I think have regard to the whole history of the matter, including the conduct of the parties, the nature of the litigation and the need of the applicant on the one hand for leave to be granted together with the effect which the granting of leave would have on other persons involved.”*

[44] His Lordship Justice Marsack JA in **Latchmi's** case stated:-

*“In deciding whether justice demands that leave should be given, care must, in my view, be taken to ensure that the rights and interests of the Respondent are considered equally with those of the Appellant.”*

[45] This Court has taken following into consideration:-

- (i) In the year 2012, Respondent paid \$1,112,262.83 to the Applicant;
- (ii) Respondent's appeal to Tax Tribunal was dismissed;
- (iii) Respondent filed appeal to High Court of Fiji which was dismissed by judgment delivered on 24 February 2017;
- (iv) Respondent appealed High Court decision to Court of Appeal which was heard on 14 September 2018, and determined on 5 October 2018;
- (v) Applicant filed Petition for Leave to Appeal on 16 November 2018 (last day for filing Petition for Leave to Appeal);
- (vi) Applicant only delayed in serving the Petition on time (16 November 2018) but served Petition on 20 November 2018 (next business day after close of business on 16 November 2018);
- (vii) Respondent had notice of Petition to Appeal from time it was served on it;
- (viii) Petition for Leave to Appeal can be determined within next five (5) months.

[46] Having considered the above, this Court is of the view that further delay of five months will not increase any prejudice caused to the Respondent, if Respondent would be successful in this matter.

### **Conclusion**

[47] Having considered all the factors this Court is of the view that interest of justice dictates that leave be granted to the Applicant to serve the Petition and Affidavit Verifying Petition filed on 16 November 2018, out of prescribed time.

### **Costs**

[48] This Court takes following into consideration:-

- (i) It is because of Applicant's officers laxity and failure to comply with the rules the Application is before the Court;
- (ii) Applicant has filed really flimsy Submission compared to very comprehensive Submission filed by the Respondent;

### **Orders**

[49] This Court makes following Orders:-

- (i) Applicant do serve the Petition for Leave to Appeal and Affidavit Verifying Petition filed on 16 November 2018 on Respondent's Solicitors office by 19 November 2019;
- (ii) Applicant do file Affidavit of Service of the Petition and an Affidavit Verifying Petition by 22 November 2019;
- (iii) Applicant do pay Respondent's Cost for Application for Enlargement of Time assessed in the sum of \$3,500.00 within twenty-one (21) days from date of this Ruling.



A handwritten signature in blue ink, consisting of a large, stylized 'K' followed by a vertical line and a horizontal stroke.

Hon. Mr Justice Kamal Kumar  
**Judge of the Supreme Court**

### **Solicitors:**

**Fiji Revenue and Customs Service Legal Division for the Petitioner/Applicant**

**Solanki Lawyers for the Respondent**